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No. 73-1138

In the Supreme Court of the United States

OCTOBER TERM, 1973

HAROLD WEISBERG, PETITIONER

v.

U.S. DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The *en banc* opinion of the court of appeals (Pet. App. B) is reported at 489 F. 2d 1195. The vacated opinion of the panel of the court of appeals (Pet. App. A) is not reported. The district court issued no opinion.

JURISDICTION

The *en banc* judgment of the court of appeals was entered on October 24, 1973. The petition for a writ of certiorari was filed on January 21, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the record in this case establishes that the documents sought by petitioner pursuant to the Freedom of Information Act may be withheld from disclosure as part of an investigatory file compiled for law enforcement purposes.

STATUTE INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, provides in pertinent part:

> (a)(3) * * * each agency, on request for identifiable records * * * shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides * * * or in which the agency records are situated has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. * * *
>
> (b) This section does not apply to matters that are:
>
> (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency; * * *.

STATEMENT

This suit was brought under the Freedom of Information Act, 5 U.S.C. 552, to compel the Department of Justice to disclose a portion of the file compiled by

the FBI in the course of its investigation of the assassination of President John F. Kennedy. The specific records sought consisted of the results of FBI spectrographic analyses of varied bullets, garments, bullet fragments, and other objects connected with the assassination (Pet. App. B–2, B–3).

Petitioner first requested the records from the Department of Justice. His request was denied by the Deputy Attorney General and the Attorney General, on the ground that the records sought were part of an investigatory file compiled for law enforcement purposes and thus exempt from compelled disclosure under Exemption 7 of the Freedom of Information Act, 5 U.S.C. 552(b)(7). Petitioner then filed suit in the district court seeking production of the records under the Freedom of Information Act (Pet. App. B–2, B–3). The government moved to dismiss, or in the alternative, for summary judgment. This motion was subsequently supplemented by the affidavit of an FBI Special Agent who had reviewed the records in question and attested that the "spectrographic examinations were conducted for law enforcement purposes as a part of the FBI investigation into the assassination" (Pet. App. C–1). After petitioner failed to file any counter-affidavit, the district court granted the motion to dismiss (Pet. App. B–3).

A divided three-judge panel of the court of appeals reversed and remanded the case to the district court, holding that Exemption 7 applies "only when the withholding agency sustains the burden of proving that disclosure of the files sought is likely to create a concrete prospect of serious harm to its law enforce-

ment efficiency either in a named case or otherwise" (Pet. App. A–8). The panel opinion, however, was vacated by the court of appeals when it ordered a rehearing *en banc* (Pet. App. B–3, n. 2).

After rehearing the case *en banc* the court of appeals, over a single dissent,[1] affirmed the district court's judgment. Judge Danaher's opinion for the court stated (Pet. App. B–3):

> We are satisfied that the record before us clearly demonstrates the desired materials were part of the investigatory files compiled by the FBI for law enforcement purposes, and, as such, are exempt from the disclosure sought to be compelled. [Footnote omitted.]

The court concluded (Pet. App. B–15):

> Here the record overwhelmingly demonstrates how and under what circumstances the files were compiled and that indeed they were "investigatory files compiled for law enforcement purposes." When the District Judge made that determination, he correctly perceived that his duty in achieving the will of Congress under the Freedom of Information Act was at an end.

ARGUMENT

The decision of the court of appeals is plainly correct. Accordingly, since there is no conflict of deci-

[1] The three-judge panel of the court of appeals consisted of Judge Danaher, who dissented, Chief Judge Bazelon, and District Judge Frank A. Kaufman. Pursuant to 28 U.S.C. 46(c), Judge Kaufman did not participate in the *en banc* rehearing, and only Chief Judge Bazelon dissented from the *en banc* decision for the reasons stated in the panel's vacated opinion.

sions, further review by this Court is not warranted.

The court of appeals properly concluded that the record in this case established that the records at issue were part of an investigatory file compiled by the FBI for law enforcement purposes. The record contained the uncontradicted affidavit of an FBI Special Agent who had reviewed the records in question and attested that they were compiled by the FBI during the course of its investigation of the assassination of President Kennedy (Pet. App. C–1). This investigatory file was clearly compiled for "law enforcement purposes" since, as the court below concluded (Pet. App. B–3 to B–6, B–10), the FBI was acting pursuant to its law enforcement functions when it compiled these records to assist in determining the assassin of the President of the United States.

Since the records sought here are part of an investigatory file compiled for law enforcement purposes, the court of appeals correctly concluded that the records are exempt from compelled disclosure by Exemption 7, which protects "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. 552 (b)(7). Petitioner's contention that Exemption 7 requires a "showing how disclosure of the records sought would harm the government's law enforcement functions or proceedings" (Pet. 2) finds no support in the language or legislative history of Exemption 7.

Exemption 7 was designed to preserve the ability of the government to perform its law enforcement functions effectively. Congress clearly recognized that this purpose could not be satisfied if members of the

public were authorized to compel disclosure of whatever items in investigatory files appeared to be of interest except as the government could prove that disclosure would produce specifically identifiable harm. As the court of appeals noted with respect to FBI files, "[w]e need only surmise the consequences to law enforcement if any 'person', knowing full well that an investigation has been conducted, can ask some federal court to compel disclosure of the Bureau's files. * * * We have no doubt whatever that Congress was fully alive to the problem where investigatory files of the FBI were involved" (Pet. App. B–11 to B–12).[2]

Contrary to petitioner's contention (Pet. 9–12), there is no conflict of decisions. While courts of appeals have analyzed the types of harm, such as disclosure of informants or investigative techniques,

[2] The Senate Report stated (S. Rep. No. 813, 89th Cong., 1st Sess. 3):

"It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation."

Similarly, the House report indicated an intent to "cover material such as the Federal Bureau of Investigation files which are not now protected by law." H. Rep. No. 1497, 89th Cong., 2d Sess. 2. The pertinent congressional debates similarly indicate a congressional intent to provide broad protection to "investigatory files" with the limited exception embodied in the clause, discussed *infra*, pp. 7–8, "except to the extent available by law to a party other than an agency." 110 Cong. Rec. 17667–17668. See also S. Rep. No. 1219, 88th Cong., 2d Sess. 8, 14.

The court of appeals further noted, however, that the Department of Justice has issued regulations under which, in the exercise of administrative discretion, investigatory files which are more than fifteen years old may be released to persons engaged in historical research (Pet. App. B–8, n.*).

that might result from the disclosure of investigatory files,[3] until the panel below issued its now-vacated decision no court of appeals had ever held, or even stated, that Exemption 7 contains the additional requirement of a specific showing of harm which petitioner seeks to read into the Act. It is noteworthy that no conflict of decisions was asserted by Chief Judge Bazelon in his dissenting opinion.

There is no merit to petitioner's contention that he is entitled to the records in question by virtue of the "except" clause in Exemption 7—"except to the extent available by law to a party other than an agency" (Pet. 17–18). The legislative history of Exemption 7 clearly shows that this exception was designed solely to insure that private litigating parties to whom material in an investigatory file is otherwise available by law do not lose that right by virtue of Exemption 7, *e.g.*, an individual who is entitled under the Jencks Act to see an FBI report. 110 Cong. Rec. 17667–17668. However, Exemption 7 "is not intended to give a private party indirectly any earlier or

[3] See *Frankel* v. *Securities and Exchange Commission*, 460 F. 2d 813 (C.A. 2), certiorari denied, 409 U.S. 889, and *Evans* v. *Department of Transportation*, 446 F. 2d 821 (C.A. 5), certiorari denied, 405 U.S. 918, both of which held Exemption 7 applicable to the records at issue there. In *Wellford* v. *Hardin*, 444 F. 2d 21 (C.A. 4), the records were not covered by Exemption 7 since they were found to be "no more than the results" of "administrative action taken to enforce the law" (444 F. 2d at 24–25).

The court of appeals below, sitting *en banc*, also found no conflict with its prior decisions. Of course, a conflict between circuits would not be presented even if the court of appeals had decided to overrule its earlier decisions. Thus, petitioner's additional reliance upon "the District of Columbia Circuit's own prior decisions" (Pet. 10) is misplaced.

greater access to investigatory files than he would have directly in such litigation or proceedings." H. Rep. No. 1497, 89th Cong., 2d Sess. 11. See *Barceloneta Shoe Corp.* v. *Compton,* 271 F. Supp. 591, 593–594 (D. P.R.). See also *Clement Brothers Co.* v. *National Labor Relations Board,* 282 F. Supp. 540, 542 (N.D. Ga.); *Benson* v. *United States,* 309 F. Supp. 1144 (D. Neb.). Thus, in the instant case, the court below correctly held that the "except" clause in Exemption 7 is not applicable to petitioner (Pet. App. B–15, n. 15). The now-vacated panel opinion, in which Chief Judge Bazelon concurred, similarly concluded that the "except" clause "is not applicable herein since Weisberg is not entitled to the information he seeks as a party to any action other than the within suit. Whether the word 'party', as used in 5 U.S.C. § 552(b)(7), includes someone other than * * * the particular party seeking the information, raises a question which this court need not resolve herein because the record does not indicate that any other person has received or is entitled to receive under any law other than the Freedom of Information Act, or under any discovery rule, the information Weisberg seeks herein" (Pet. App. A–3, n. 3; citations omitted).

Finally, there is no merit in petitioner's assertion that the court below has held that an agency can meet its burden of establishing the applicability of Exemption 7 "by mere edict" and that "[t]he role of the

court is thus reduced to that of a rubber stamp" (Pet. 10, 14). The opinion of the court of appeals emphasizes that the agency's "*ipse dixit* does not finalize the matter, for there remains the judicial function of determining whether that classification be proper" (Pet. App. B–14). Contrary to petitioner's assertion (Pet. 16), the court of appeals did not treat Exemption 7 "in the same manner" as this Court treated Exemptions 1 and 5 in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73. The court below clearly stated that Exemption 7, no less than Exemption 5, 5 U.S.C. 552(b)(5), is strikingly different from Exemption 1, and that the application of Exemption 7 "will turn ultimately upon a determination by the district court that disclosure is not required—as in the instant case" (Pet. App. B–14; footnote omitted). The court of appeals was also "satisfied that the record before us clearly demonstrates the desired materials were part of the investigatory files compiled by the FBI for law enforcement purposes" (Pet. App. B–3; footnote omitted), and that "the record overwhelmingly demonstrates how and under what circumstances the files were compiled and that indeed they were 'investigatory files compiled for law enforcement purposes'" (Pet. App. B–15).[4]

[4] The court of appeals also concluded (Pet. App. B–14, n. 14) that the record in this case was sufficient to meet the standards of proof established in its earlier decision in *Vaughn* v. *Rosen*, 484 F. 2d 820, certiorari denied, March 18, 1974, No. 73–1107, upon which petitioner relies (Pet. 19–20).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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